BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

To the Editors of THE HARVARD LAW REVIEW:

In a very courteous note on my recent article, dealing with "*Rescission for Breach of Warranty*," you suggest that Professor Williston and I hold "different views as to the location of the boundary line on one side or the other of which a case is to be ranged"; adding, "Professor Williston finds the real distinction taken by the English law to be that between executed and executory contracts, no rescission being allowed in any case of an executed sale." Permit me to say that such is my understanding of the English rule, and of the rule generally prevailing in this country. My own statement upon this topic may be found in my text-book on Sales (2d ed.), at p. 140. I can discover nothing in my recent article at variance with that statement.

A little later in the note, you write: "In nearly all of the cases in dispute the engagement fell within one of these classes, and after acceptance of the title, rescission was allowed upon discovery of the defect"; citing as the first case in support of this statement *Polhemus* v. *Heiman*, 45 Cal. 573. I fancy the citation is due to a slip of the pen, for, in *Polhemus* v. *Heiman*, rescission was neither allowed nor sought.

I quite agree with you that "there can be no ground for contention that the property had not passed in a case where the guano purchased had been put into the soil by the buyer, as in *Pacific, etc., Co.* v. *Mullen*, 66 Ala. 582." I think, too, that you will agree with me that such use of the guano put an end to the buyer's right of rescission under the Massachusetts rule. After intentionally putting the guano into the soil, he was no longer in a position to "rescind the contract for breach of warranty by a seasonable return of the property." See *Bryant* v. *Isburgh*, 13 Gray (Mass.) 607. Professor Williston's Draft of Code, § 54 (3). Indeed, *Pacific, etc., Co.* v. *Mullen* would have been decided in England precisely as it was decided in Alabama. It applies the principle which was applied in the same way in *Poulton* v. *Lattimore*, 9 B. & C. 259, and which is incorporated in the English Sale of Goods Act, § 53 (1) (a). This Alabama case is not open even to a suspicion of following the Massachusetts rule instead of the English law.

Very respectfully,

FRANCIS M. BURDICK.

The criticism to which Professor Burdick takes exception in this very friendly manner was aimed at showing unfounded what was understood to be his view of the English rule, viz. — that under it rescission is allowed, even after the passage of title, for the breach of an implied warranty or condition, such, for example, as the implied engagement, that goods sold by description shall correspond with the description, or that goods sold for a particular purpose known to the seller shall be reasonably fit for that purpose. This understanding was based on the following passage, among others, in his article: "the question in dispute is not whether the purchaser can rescind for the breach of any sort of warranty; but whether he can rescind for the breach of a collateral or subsidiary warranty. In England, as in Massachusetts, the purchaser is entitled to rescind the contract for the breach of" an implied warranty, or condition. 4 Columbia L. Rev. 2. If the only dispute between the jurisdictions is as to the case of a collateral warranty, then they must be in accord as to the remedy for the breach of an implied warranty, or condition, in all cases, including those where the sale is executed; and it will hardly be denied that Massachusetts

courts allow rescission after the passage of title as freely for the breach of an implied as of a collateral warranty.

Again, in order to show that cases allowing rescission cited by Professor Williston as supporting the Massachusetts rule and opposed to the English rule would have been similarly decided in England, Professor Burdick was contented in his article merely to point out that the warranties were conditions under the Sale of Goods Act, or "vital, not subsidiary promises." 4 Columbia L. Rev. 6, 7, notes 3 and 5. But if before the passage of title rescission is allowed for breach of a collateral warranty as well as for breach of a condition, as Professor Burdick impliedly asserts on page 5; and if the breach of a condition does not necessarily operate to prevent the vesting of title, a suggestion which he expressly repudiates in 4 Columbia L. Rev. 265, then it is hard to see the sufficiency, or even the pertinence, of the distinction unless on the basis that the breach of a condition makes rescission allowable even after passage of title.

But it appears from the above communication, and indeed it is specifically stated in a second and more recent article by Professor Burdick in 4 Columbia L. Rev. 265, replying to an answer to his first paper published by Professor Williston in 4 Columbia L. Rev. 195, that Professor Burdick agrees that the issue is "whether rescission of an executed sale is allowable for breach of a promise, whether collateral, part of the description, or wholly implied."

The question in regard to the cases in dispute seems to have become now merely whether in those cases title had been finally accepted at the time when rescission was sought, or whether possession had been taken merely for examination. The individual cases have been carefully analyzed in this regard by Professor Williston and Professor Burdick in the March and April numbers respectively of the Columbia Law Review, to which the reader is referred.

Professor Burdick's protest against the citation of cases in the previous note in this Review deserves attention, though collateral to the main issue. It must be admitted that *Polhemus* v. *Heiman* stands for rescission only by a *dictum*. *Pacific, etc., Co.* v. *Mullen* was cited as a case where it was indubitable that title had passed, and yet rescission was allowed. The plaintiff was not permitted to recover in an action brought for the price of the goods. It is true that the same result would have been reached in England on the basis of recoupment, the guano being worthless; but the court places its decision on the ground of rescission, not of recoupment. The requirement that the goods be returned as a condition precedent to the right of rescission is probably in Massachusetts as elsewhere where rescission is allowed subject to an exception when the goods are valueless. See *Perley* v. *Balch*, 23 Pick. Mass. 283, 286. The case, therefore, would have been similarly decided in Massachusetts on the same reasoning, whereas the result would not have been reached in England except on totally different grounds.

DEGREE OF CARE TO BE EXERCISED BY A GRATUITOUS BAILEE. — The nature and extent of a bailee's liability in gratuitous bailments is not fully explained by the text writers nor clearly set forth in the cases. On the one hand, there is the rule, at least nominally established, that a gratuitous bailee is liable only for gross negligence, the application of which is discussed to a very limited extent in a recent article. *Degree of Care to be Exercised by a Gratuitous Bailee*, Anon., 58 Central L. J. 181 (Mar. 4, 1904). On the other hand, it has been forcefully contended that a gratuitous bailee is held to such a degree of care and exertion in the business as he in fact undertook to bestow. See 5 HARV. L. REV. 222.

It must be admitted at the outset that the rule first stated is in itself no test of a bailee's liability. Negligence is a breach of some duty. The duty which the gratuitous bailee owes to his bailor arises, not from any contractual relation between the parties nor from their relation as members of society, but solely from the new relation in which they have been placed by the voluntary under-